CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, and Notices

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

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This issue contains:

U.S. Customs Service
T.D. 93–16
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Appeal No. 91–1236, 91–1257, 91–1470, and 91–1482
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Slip Op. 93–29 Through 93–33

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

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U.S. Customs Service

Treasury Decision

(T.D. 93-16)

EXTENSION OF UNIMAR, INC. INTERNATIONAL'S CUSTOMS GAUGER APPROVAL AND LABORATORY ACCREDITATIONS TO INCLUDE A NEW SITE LOCATED IN BROWNSVILLE, TEXAS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of the extension of Unimar, Inc., International's Customs gauger approval and accreditations to include a new site in Brownsville, Texas.

SUMMARY: Unimar Inc., International of Houston, Texas, a Customs approved gauger and accredited laboratory under Section 151.13 of the Customs Regulations (19 CFR 151.13), has been given an extension of its Customs gauger approval and laboratory accreditations to include a new site in Brownsville, Texas. Specifically, the extension given to the Brownsville site will include the approval to gauge petroleum and petroleum products, organic compounds in bulk and liquid form and animal and vegetable oils; and accreditations to perform the following laboratory analyses: API Gravity, water by distillation and sediment by extraction.

SUPPLEMENTARY INFORMATION: Part 151 of the Customs Regulations provides for the acceptance at Customs Districts of laboratory analyses and gauging reports for certain products from Customs accredited commercial laboratories and approved gaugers. Unimar, Inc., International, a Customs-approved commercial gauger and accredited laboratory, has applied to Customs to extend its Customs gauger approval and certain laboratory accreditations to its Brownsville, Texas facility. Review of the qualifications of Unimar, Inc., International's Brownsville site shows that the extension is warranted and, accordingly, has been granted.

EFFECTIVE DATE: March 5, 1993.

FOR FURTHER INFORMATION CONTACT: Ira S. Reese, Special Assistant for Commercial and Tariff Affairs, Office of Laboratories and

Scientific Services, U.S. Customs Service, 1301 Constitution Ave., NW, Washington, D.C. 20229 (202–927–1060).

Dated: March 12, 1993.

J.E. HARRELL,
Acting Director,
Office of Laboratories and Scientific Services.

[Published in the Federal Register, March 18, 1993 (58 FR 14612)]

U.S. Court of Appeals for the Federal Circuit

IPSCO, Inc. and IPSCO Steel, Inc., plaintiffs/cross-appellants, and Algoma Steel Corp., Ltd. and Sonco Steel Tube Div., Ferrum, Inc., plaintiffs *v.* United States, defendant-appellee *v.* Lone Star Steel Co., defendant-appellant

Appeal No. 91-1236 and 91-1257

(Decided June 3, 1992)

Rufus E. Jarman, Jr., Barnes, Richardson & Colburn, of New York, New York, argued for plaintiffs/cross-appellants. With him on the brief was *Alan Goggins*.

Valerie A. Slater, Akin, Gump, Strauss, Hauer & Feld, of Washington, D.C., argued for defendant-appellant.

Jeanne E. Davidson, Attorney, Commercial Litigation Branch, Department of Justice, of Washington, D.C., argued for defendant-appellee. With her on the brief were *Stuart M. Gerson*, Assistant Attorney General and *David M. Cohen*, Director. Also on the brief was *Thomas G. Ehr*, Attorney-Advisor, Office of the Chief Counsel for Import Administration, Department of Commerce, of counsel.

Appealed from: U.S. Court of International Trade.
Judge Restani.

Before Rich, *Circuit Judge*, Smith, *Senior Circuit Judge*, and Rader, *Circuit Judge*.

Rader, *Circuit Judge*.

In a case challenging an antidumping investigation, the Lone Star Steel Company appealed a May 18, 1989, order of the United States Court of International Trade. *IPSCO, Inc. v. United States*, 714 F. Supp. 1211 (Ct. Int'l Trade 1989) (*IPSCO II*). This order rejected the United States Department of Commerce International Trade Administration's (ITA) method of calculating the value of oil country tubular goods (OCTG). Because ITA reasonably interpreted 19 U.S.C. § 1677b(e) (1988), this court reverses the trial court's order and upholds ITA's original calculation method.

Cross-Appellants, IPSCO, Inc., and IPSCO Steel, Inc. (IPSCO), appealed an October 30, 1990, order of the trial court. *IPSCO, Inc. v. United States*, 749 F. Supp. 1147 (Ct. Int'l Trade 1990) (*IPSCO IV*). This order sustained ITA's decision to base the value of a particular grade of OCTG on three, rather than six, months of tonnage data. Because IPSCO did not timely object, this court affirms the trial court's order.

BACKGROUND

OCTG—steel pipe for oil and gas wells—comes in two grades: prime and limited-service. After production of a manufacturing lot, the producer categorizes the pipe into two OCTG grades. Pipe that meets the standards of the American Petroleum Institute (API) becomes prime OCTG. Pipe beneath API standards becomes limited-service OCTG. The API standards rate pipe based on stress and serviceability tests.

Producers sell prime OCTG under a warranty and at a higher price than limited-service OCTG. Limited-service OCTG sells without a warranty and at prices below prime OCTG. Other than quality and market value, there are no differences between prime and limited-service OCTG. The same materials, processes, labor, and overhead go into the manufacturing lot which yields both grades of OCTG. Moreover buyers purchase the separate grades for the same purpose—"down hole" use in oil and gas wells.

In July 1985, Lone Star Steel, a domestic producer of OCTG, filed an antidumping petition against Canadian OCTG producers. In 1986, the ITA determined that Canadian producers had sold pipe in the United States at less than fair value. *Antidumping; Oil Country Tubular Goods from Canada; Final Determination of Sales at Less than Fair Value,* 51 Fed. Reg. 15029 (Apr. 22, 1986), *as amended,* 51 Fed. Reg. 29579 (Aug. 19, 1986). ITA's determination extended to both prime and limited-service OCTG. *Id.* at 15,036.

ITA later issued an antidumping duty order. *Antidumping Duty Order; Oil Country Tubular Goods (OCTG) from Canada,* 51 Fed. Reg. 21782 (June 16, 1986), *as amended,* 51 Fed. Reg. 29579 (Aug. 19, 1986). Canadian pipe producers, including IPSCO, appealed ITA's final determination to the Court of International Trade. *IPSCO, Inc. v. United States,* 687 F. Supp. 633 (Ct. Int'l Trade 1988) (*IPSCO I*). IPSCO challenged ITA's method for assigning costs to limited-service OCTG. In particular, IPSCO challenged ITA's equal allocation of production costs between the prime and limited-service pipe. Because produced simultaneously, limited-service and prime pipe in fact had identical production costs. ITA treated limited-service pipe as a co-product of prime pipe.

IPSCO argued that ITA should instead treat limited-service OCTG as a by-product. When calculating values under 19 U.S.C. § 1677b(e), the ITA generally deducts the value of by-products from the combined cost of producing the prime product. By-products, however, are secondary products not subject to investigation. *IPSCO II,* 714 F. Supp. at 1213 n.2.

Upon initial consideration, the trial court remanded the case to ITA for a fuller explanation of its method for calculating value. *IPSCO I,* 687 F. Supp. at 638. On September 2, 1988, ITA restated the reasons for treating limited-service OCTG as a co-product. ITA relied heavily on IPSCO's treatment of limited-service OCTG as a co-product in some financial statements.

IPSCO again challenged ITA's decision. *IPSCO, Inc. v. United States,* 714 F. Supp. 1211 (Ct. Int'l Trade 1989) (*IPSCO II*). In *IPSCO II,* IPSCO again argued that limited service OCTG is a by-product. IPSCO also argued that ITA should set a lower home market value for limited-service OCTG imported into the United States. *Id.* at 1213.

The trial court rejected IPSCO's by-product argument. *Id.* at 1213–14. The court, however, did not embrace ITA's valuation method. Treating limited-service OCTG as a co-product, ITA had split the production costs equally between prime and limited-service OCTG. The court reasoned that ITA's method did not account for differences in value between prime and limited-service OCTG. *Id.* at 1215. Thus, the trial court remanded to ITA a second time. On remand, the court instructed ITA to account for these value differences. *Id.*

ITA issued a second remand determination on November 8, 1989. This time ITA allocated the cost of production between prime and limited-service OCTG based on their proportionate market value. Under this revised method, the allocated production cost for limited-service OCTG was less than its actual production cost. These reductions in production cost also reduced the overall foreign market value for limited-service OCTG.

This new value-based cost allocation, however, had the opposite effect on prime pipe's foreign market value. With less of the costs of producing a lot of OCTG allocated to limited-service product, the prime product received a higher cost allocation. A higher production cost meant that prime pipe had a higher foreign market value. Thus, ITA's new method shifted costs from limited-service to prime pipe.

At this point, IPSCO challenged another aspect of ITA's cost assessment. IPSCO argued that ITA had erroneously based its value calculation for a particular grade of OCTG on only three months of tonnage data. ITA had used six months of data for other grades of OCTG. IPSCO argued that ITA should have corrected this ministerial error. *See* 19 U.S.C. § 1673d(e) (1988). The trial court remanded to ITA to determine whether IPSCO raised the alleged error "within a reasonable time" after ITA's original final determination, as required by section 1673d(e). *IPSCO, Inc. v. United States,* No. 90–37 (Ct. Int'l Trade Apr. 16, 1990) (*IPSCO III*).

On May 22, 1990, ITA issued a third remand determination reconfirming its second remand determination. ITA was unable to determine if any error had actually occurred. However, ITA concluded that IPSCO could have discovered with due diligence any erroneous calculations and data. IPSCO appealed ITA's third remand determination. *IPSCO IV,* 749 F. Supp. at 1147. The court ruled against IPSCO. *Id.* at 1150.

Lone Star Steel appeals the court's *IPSCO II* decision to reverse and remand ITA's method of assigning costs to limited-service pipe. IPSCO cross-appeals the court's *IPSCO IV* decision to sustain ITA's refusal to recalculate values for a particular grade of pipe.

Discussion

I

When ITA determines that a foreign entity has sold merchandise in the United States at less than fair value, and the International Trade Commission finds the domestic industry injured by the importation of that merchandise, Title 19 imposes an antidumping duty. 19 U.S.C. § 1673 (1988). The duty is the amount by which the merchandise's foreign market value exceeds its United States price. *Id.* Foreign market value is the price of the merchandise in the producer's home market or its export price to countries other than the United States. 19 U.S.C. § 1677b(a)(1). In setting forth the computation for foreign market value, however, section 1677b disregards, under specified circumstances, home or export market sales at less than the cost of production. 19 U.S.C. § 1677b(b). If home or export market sales do not yield a reliable measure of foreign market value, the statute directs computation of a constructed value in lieu of the foreign market value. *Id.*

The statute gives a specific formula for assessing constructed value:

> (e) Constructed value
>
> (1) Determination
>
> For the purposes of this subtitle, the constructed value of imported merchandise shall be the sum of—
>
> (A) the cost of materials (exclusive of any internal tax * * *) and of fabrication or other processing of any kind employed in producing such or similar merchandise * * *
>
> (B) an amount for general expenses and profit * * *
>
> *   *   *   *   *   *   *
>
> (C) the cost of all containers and coverings of whatever nature * * *.

19 U.S.C. § 1677b(e). This section defines constructed value as the combined cost of materials, fabrication or other processing of any kind, general expenses and profit, and other incidental shipping expenses. The cost of materials encompasses the cost of raw components in the manufacturing process. The cost of fabrication or other processing of any kind encompasses capital and labor costs. The cost of general expenses encompasses overhead. The statute also includes profit within constructed value. The statute provides minimum values for general expenses and profit in terms of percentages of materials and fabrication costs. 19 U.S.C. § 1677b(e)(1)(B)(i) and (ii). By its terms, the statute expressly covers actual production costs. The broad terms of section 1677b(e) sweep within constructed value all components of the actual production costs of merchandise. The statute, for instance, includes fabrication costs, yet emphasizes that the cost of "other processing of any kind" also falls within constructed value. The broad language of section 1677b(e) does not at any point expressly authorize adjustment of these production costs to account for products of a lower grade or less value.

In addition to its language, the constructed value section's context within Title 19 suggests computation of actual production costs. Under

section 1677b(b), ITA must determine whether the price of home market sales is a proper measure of foreign market value. Section 1677b(b) requires ITA to disregard home market sales at prices below the "cost of producing the merchandise." If neither home market nor third-party exports provides an adequate basis for determining foreign market value, ITA must calculate instead a constructed value. ITA then compares the constructed value with sales prices in the United States to determine the antidumping duty. 19 U.S.C. § 1673. Thus, constructed value comes into play when ITA determines that a foreign producer sells at home below its "cost of producing the merchandise." This context, confirmed by the language of section 1677b(e), links constructed value and section 1677b(b)'s "cost of producing the merchandise."

Although the statute does not specifically define "cost of production"—the benchmark for assessing whether home or third-party export market prices are below cost—the regulations defining the term emphasize its link to constructed value. The Department of Commerce's antidumping regulations provide:

> The Secretary will calculate the cost of production based on the cost of materials, fabrication, and general expenses, but excluding profit, incurred in producing such or similar merchandise.

19 C.F.R. § 353.51(c) (1990), *superseding* 19 C.F.R. § 3537(b) (1989). Thus, the regulations adopt the terms of the constructed value section—cost of materials, fabrication, and general expenses—to define "cost of production." Indeed the trial court in this case correctly discerned no distinction "in any way significant to this case" between section 1677b(b)'s cost of production and the cost of production utilized in calculating constructed value. *IPSCO, II,* 714 F. Supp. at 1216 n.9. Thus, the context and the language of the statute show that constructed value is based on the cost of producing the merchandise.

The legislative history of Title 19 discloses a reliance on cost of production as an independent standard. In reference to section 1677b(b), the Senate committee report stated:

> [I]n the absence of such a provision, sales uniformly made at less than cost of production could escape the purview of the Act, and thereby cause injury to United States industry with impunity.

S. Rep. No. 1298, 93d Cong., 2d Sess. 173 (1974); *reprinted in* 1974 U.S.C.C.A.N. 7186, 7310. The legislative history confirms the statute's unambiguous intent to provide cost of production as an independent yardstick for deciding whether home and export sales prices are suitable for fair value comparisons. Within section 1677b(e), the constructed value section, cost of production also emerges as an alternative independent standard for fair value.

In lieu of computing a foreign market value for IPSCO's OCTG, ITA calculated a constructed value. In making this calculation, ITA counted the actual cost of materials, fabrication, and overhead for limited-service and prime OCTG. Because the same manufacturing lot produced both grades of pipe, ITA allocated production costs equally between lim-

ited-service and prime OCTG. In sum, ITA calculated constructed value precisely as the statute directs. Because IPSCO expended the same materials, capital, labor, and overhead for both grades of OCTG, the constructed value of one ton of limited-service pipe necessarily matched the constructed value of one ton of prime pipe.

ITA thus treated limited-service pipe as a co-product, not as a by-product. ITA further explained its reasons for this treatment:

> Because the off-spec merchandise is used as OCTG and can be very similar to prime merchandise, we have included it in this investigation and made comparisons of United States price with foreign market value for sales of off-spec merchandise. In order to allow such comparison, we rejected IPSCO's methodology of treating off-spec production as a by-product.

51 Fed. Reg. at 15036.

Because ITA computed constructed value according to the unambiguous terms of Title 19, the trial court erred in rejecting that method:

> By declining to account for differences in value and treating prime and limited service products identically in its calculation of foreign market value, ITA made an unreasonable fair value comparison * * *.

IPSCO II, 714 F. Supp. at 1215. On remand, ITA complied with the trial court's order by calculating costs for both limited-service and prime products on the basis of their relative prices in the United States market. In other words, the value of IPSCO's products – their prices in the United States – became a factor in determining their cost of production. That cost of production, in turn, determined by IPSCO's prices in the United States reflected fair value.

Essentially, the trial court ordered an unreasonable circular methodology. The selling price of pipe became a basis for measuring the fairness of the selling price of pipe. This circular reasoning contravened the express requirements of the statute which set forth the cost of production as an independent standard for fair value.

In light of the language of Title 19, ITA's original methodology for calculating constructed value was a consistent and reasonable interpretation of section 1677b(e). The trial court therefore also erred in substituting "its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron U.S.A. v. Natural Resources Defense Council,* 467 U.S. 837, 844 (1984); *IPSCO, Inc. v. United States,* 899 F.2d 1192, 1194–95 (Fed. Cir. 1990) ("We give due weight to the agency's interpretation of the statute it administers, and we accept that interpretation if it is 'sufficiently reasonable.'"); *U.H.F.C. Co. v. United States,* 916 F.2d 689, 698 (Fed. Cir. 1990) ("It is well settled that an agency's interpretation of the statute it has been entrusted by Congress to administer is to be upheld unless it is unreasonable.").

II

After ITA had completed its investigation pursuant to the trial court's second remand order, IPSCO discovered that ITA had used only three months of data to calculate constructed value. IPSCO requested correction of this alleged error. The court remanded again to ITA to determine whether it used correct tonnage data. ITA determined that, regardless of whether an error occurred, the three months of data was relevant to the question. Moreover IPSCO could have discovered the error earlier through due diligence. At that point, the court sustained as a final determination ITA's response:

> Whatever the source of confusion, the relevant tonnage data was in the original record, it was significant to the outcome of the original determination, it involved an important product, and it could have been found without *unduly* burdening plaintiff.

IPSCO IV, 749 F. Supp. at 1150 (emphasis in original).

This court discerns no error in the trial court's rejection of IPSCO's request for correction of the alleged "error." IPSCO did not raise the alleged error until December of 1989, nearly forty-four months after ITA's original final determination. During that lengthy period of active litigation spanning two remand proceedings, IPSCO did not exercise due diligence. IPSCO has no reasonable excuse for its failure to detect the use of three months of data for some grades of OCTG.

The trial court properly balanced IPSCO's lack of due diligence against the interests of judicial and administrative finality:

> Judicial economy, fairness to the parties and the need to fulfill Congress's intent of prompt resolution of these matters requires that errors of methodology, data selection, calculation, etc. all be raised from the out-set, unless some extraordinary factor supports relief at a later date. The court finds no extraordinary factor present here.

Id. This court discerns no error in this reasoning.

IPSCO argues that 19 U.S.C. § 1675(f) compels correction of this error. Section 1675(f) of Title 19 authorizes the Department of Commerce to adopt procedures for correction of ministerial errors "within a reasonable time" after issuance of a final determination. *See also* H.R. Rep. No. 40, 100th Cong., 1st Sess., pt. 1, at 144 (1987) (This provision allows "for the correction of ministerial errors in final determinations within a limited time period after their issuance."). However, IPSCO did not seek correction of this alleged error within a reasonable time.

CONCLUSION

With respect to Lone Star Steel's appeal, this court reverses the trial court's decision in *IPSCO II* and remands with instructions to recalculate constructed value using ITA's original methodology. ITA's original method was a reasonable interpretation of 19 U.S.C. § 1677b(e).

With respect to IPSCO's cross-appeal, this court affirms the trial court's decision in *IPSCO IV.* IPSCO did not raise the alleged error within a reasonable time after the original final determination.

Costs

Each party will bear its own costs.

REVERSED-IN-PART, AFFIRMED-IN-PART AND REMANDED

UNITED STATES, PLAINTIFF-APPELLEE *v.* COMMODITIES EXPORT CO., DEFENDANT-APPELLANT, AND OLD REPUBLIC INSURANCE CO., DEFENDANT-APPELLANT

Appeal No. 91–1470 and 91–1482

(Decided August 11, 1992)

Mark S. Sochaczewsky, Attorney, Commercial Litigation Branch, Department of Justice, of New York, New York, argued for plaintiff-appellee. With him on the brief were *Stuart M. Gerson,* Assistant Attorney General, *David M. Cohen,* Director and *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office. Also on the brief was *Michele L. Kenney,* U.S. Customs Service, of counsel.

Roger E. Craig, of Naples, Florida, argued for defendant-appellant, Commodities Export Co. With him on the brief was *Walter H. Lubienski,* Lubienski & Lubienski, of Detroit, Michigan. *Wayne Jarvis,* Wayne Jarvis, Ltd., of Chicago, Illinois, argued for defendant-appellant, Old Republic Insurance Co. With him on the brief was *Michael G. Hodes,* Hodes & Pilon, of Chicago, Illinois, of counsel.

Appealed from: U.S. Court of International Trade.
Judge TSOUCALAS.

Before ARCHER, *Circuit Judge,* BENNETT, *Senior Circuit Judge,* and RADER, *Circuit Judge.*

RADER, *Circuit Judge.*

The United States sued Commodities Export Company and Old Republic Insurance Company in the United States Court of International Trade to recover unpaid liquidated damages under a customs warehouse bond. The trial court entered judgment in favor of the United States. *United States v. Commodities Export Co. & Old Republic Ins. Co.,* CIT No. 89–03–00144, May 14, 1991. Because the United States did not file its action within the six year statute of limitation, 28 U.S.C. § 2415(a) (1988), this court reverses.

Background

Section 1557(a) of Title 19 (1988) allows an importer to store imported foreign merchandise in a bonded warehouse for up to five years from the date of importation without paying duties. An importer must pay duties on merchandise removed from storage for consumption within this country. *Id.* An importer pays no duties, however, on merchandise withdrawn from storage for export. *Id.*

Commodities sells both domestic and foreign goods from its duty-free store. This store lies directly adjacent to the Canadian border in Detroit. Commodities stores its merchandise in a bonded warehouse under 19 U.S.C. § 1557(a). As a duty-free sales enterprise, Commodities sells its merchandise in export only. *See* 19 U.S.C. § 1555(b) (1988). Thus, Commodities sells its merchandise to persons immediately leaving the United States to enter Canada. In the event of a sale to persons remaining in the United States, Commodities must collect duties. *See United States v. Commodities Export Co.,* 733 F. Supp. 109, 110 (Ct. Int'l Trade 1990) (*Commodities I*).

"To insure payment of duties and other charges due to runaways and other infractions," the United States entered into a warehouse bond agreement with Commodities, as principal, and Old Republic Insurance, as surety. *Id.* Under the agreement, Commodities and Old Republic jointly and severally promised to pay liquidated damages of $100 for each violation of the bond's terms. Moreover, they agreed to pay liquidated damages of five times the duty and tax on any dutiable merchandise removed from the warehouse without the Customs Service's approval. The bond required Commodities to mark its merchandise correctly and to notify Customs of any inventory discrepancies.

On February 22, 1983, Customs conducted a spot check of Commodities' warehouse. The investigation revealed that Commodities had not properly marked 37 warehouse entries and had not notified Customs of inventory shortages in seven entries. On March 21, 1983, Customs sent Commodities a demand for payment of liquidated damages for breach of the bond. *See* 19 C.F.R. 172.1(a) (1982). The demand required Commodities to pay $6,293.96 or petition for relief within 60 days. On May 19, 1983, Commodities objected to the assessment of liquidated damages. Customs denied Commodities' petition on November 4, 1987. On November 20, 1987, Customs formally demanded payment by Old Republic within 30 days. On February 20, 1988, March 5, 1988, and March 19, 1988, Customs issued bills to Commodities and Old Republic for payment of the liquidated damages. Neither defendant paid Customs.

On March 17, 1989, the United States brought this action against Commodities and Old Republic to recover the unpaid liquidated damages. The trial court denied defendants' motion to dismiss for lack of subject matter jurisdiction. *Commodities I.* Defendants then moved to dismiss because the statute of limitations had run and because Customs had actually liquidated the goods duty-free. The trial court denied this motion also. *United States v. Commodities Export Co.,* 755 F. Supp. 418 (Ct. Int'l Trade 1991) (*Commodities II*).

At trial, the jury affirmed the validity of the bond agreement and found that Commodities had breached the bond. On May 14, 1991, the court entered judgment in favor of the United States.

Discussion

I

Section 1582 of Title 28 (1988) sets forth exclusive jurisdiction for the Court of International Trade:

> The Court of International Trade shall have exclusive jurisdiction of any civil action which arises out of an import transaction and which is commenced by the United States—
>
> (1) to recover a civil penalty under section 592, 641(b)(6), 641(d)(2)(A), 704(i)(2), or 734(i)(2) of the Tariff Act of 1930;
>
> (2) to recover upon a bond relating to the importation of merchandise required by the laws of the United States or by the Secretary of the Treasury; or
>
> (3) to recover customs duties.

Thus, to fall within the exclusive jurisdiction of the Court of International Trade, this action to recover on a bond must be "commenced by the United States," "arise[ ] out of an import transaction," and "relat[e] to the importation of merchandise required by the laws of the United States or by the Secretary of the Treasury." *Id.*

The United States' commencement of this action satisfies the first element. The second and third elements require this court to construe the terms "import transaction" and "importation." Specifically this court must determine whether foreign goods in a bonded warehouse are "imported" within the meaning of 28 U.S.C. § 1582(2). The statutes governing bonded warehouses repeatedly refer to warehouse goods as imports. For instance, 19 U.S.C. § 1557(a) permits an importer to store merchandise in a bonded warehouse without payment of duties for up to five years from the date of "importation." Section 1557 thus considers goods imported upon their entry into this country, rather than upon payment of duties before merchandise enters domestic commerce.

Similarly, section 1555(a) of Title 19—the statute authorizing Commodities' and Old Republic's bond—refers to "imported" merchandise in customs bonded warehouses. Thus, goods in bonded warehouses are "imported" upon entry into this country and storage in a bonded warehouse. The importer need pay no duties to "import" merchandise stored in its warehouse. The Supreme Court has adopted the language of Title 19 in referring to goods in bonded warehouses. *R.J. Reynolds Tobacco Co. v. Durham County,* 479 U.S. 130, 134 n.3 (1986) ("Goods may remain in a customs-bonded warehouse for up to five years from the date of importation * * *."); *see also Xerox Corp. v. County of Harris,* 459 U.S. 145, 150 (1982) ("Congress established a comprehensive customs system which includes provisions for Government-supervised bonded warehouses where imports may be stored duty free for prescribed periods."); *Cunard S.S. Co. v. Mellon,* 262 U.S. 100, 122 (1923) ("If there be an actual bringing in it is importation regardless of the mode in which it is effected. Entry through a custom house is not of the essence of the act.").

In *Stone & Downer Co. v. United States,* 19 CCPA 259, 264 (1931), *cert. denied,* 287 U.S. 619 (1932), this court's predecessor noted that

"importation" has a different meaning for the timing of duty payments. *Stone & Downer* clarified that Title 19 requires Customs to assess duties at the time foreign goods in a bonded warehouse enter into domestic commerce, rather than at the time these goods enter the warehouse. *Id.* In that context, Customs collects duties on "imported" goods upon entry into domestic commerce. Because this appeal does not concern the timing of duty assessments, *Stone & Downer* is not applicable.

By referring to "import transaction" or "importation of merchandise," 28 U.S.C. § 1582 gave the Court of International Trade jurisdiction over bonded warehouses. The phraseology of section 1582 underscores the breadth of this jurisdictional grant. A civil action need only arise out of an import transaction to fall within the court's jurisdiction. Moreover a bond need only relate to importation. This broad language commits a wide spectrum of controversies concerning the importation process to the Court of International Trade.

The legislative history of section 1582 also supports the breadth of the jurisdictional grant to the Court of International Trade. The House report accompanying the 1980 rewrite of this provision described the court's jurisdiction as "a comprehensive system of judicial review of civil actions arising from import transactions." H.R. Rep. No. 1235, 96th Cong., 2d Sess. 20 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3731.

Under the terms of 28 U.S.C. § 1582(2), this action against Commodities falls within the jurisdiction of the Court of International Trade. The United States brought the action. Two-thirds of the merchandise in Commodities' warehouse is foreign. By bringing this merchandise into the United States, Commodities conducted an "import transaction." This civil action thus "arises out of an import transaction," satisfying the second jurisdictional requirement of 28 U.S.C. § 1582(2).

Finally, the bond in this case relates to importation in at least two ways. The bond's terms deal with Commodities' documentation and manipulation of imported merchandise in its warehouse. The bond also ensures payment of duties on imported merchandise in the event those duties become payable. Therefore, Commodities' bond "relat[es] to the importation of merchandise," satisfying the third element of 28 U.S.C. § 1582(2). The trial court therefore properly exercised jurisdiction over this action.

II

This court must next determine the statute of limitations which applies to this action. Section 1621 of Title 19 sets forth a five-year limitation on any "suit or action to recover any pecuniary penalty or forfeiture of property accruing under the customs laws." 19 U.S.C. § 1621 (1988). Section 2415(a) of Title 28 provides a six-year limitation on "every action * * * brought by the United States or an officer or agency thereof which is founded upon any contract." 28 U.S.C. § 2415(a).

The five-year statute of limitations in 19 U.S.C. § 1621 does not apply in this case because the United States does not seek "pecuniary penalt[ies] * * * accruing under the customs laws." *See also United*

States v. Imperial Food Imports, 834 F.2d 1013, 1016, 6 Fed. Cir. (T) 37, 40 (1987) ("Liquidated damages are not penalties if they are reasonable and the exact amount of the damages sustained would be difficult to prove."). Rather, the United States brought this action to recover liquidated damages under the terms of a contract, the bond agreement. Because "founded upon [a] contract," this action falls within the language of 28 U.S.C. § 2415. Therefore, the trial court properly applied a limitations period of six years in this case.

III

Finally this court must decide whether the United States filed this action within the applicable statutory period. Under 28 U.S.C. § 2415(a), the United States may not bring an action "unless the complaint is filed within six years after the right of action accrues."

The trial court determined that the Government's right of action accrued on May 20, 1983, after Customs followed its own regulations. *Commodities II,* 755 F. Supp. at 422. In these regulations Customs imposes on itself the requirement to demand payment from a party who has not met the conditions of a customs bond. 19 C.F.R. § 172.1(a).[1] If that party does not pay within 60 days of Customs' mailing of notice, "the district director of Customs, after required collection action, shall refer the claim promptly to the United States attorney." 19 C.F.R. § 172.2(a) (1982).

As a general principle, this court recognizes that "[u]nder federal law governing statutes of limitations, a cause of action accrues when all events necessary to state a claim have occurred." *Chevron U.S.A. v. United States,* 923 F.2d 830, 834 (Fed. Cir.), *cert. denied,* 112 S. Ct. 167 (1991); *Nager Elec. Co. v. United States,* 368 F.2d 847, 851–52 (Ct. Cl. 1966). The Supreme Court also has long recognized this general rule. *United States v. Lindsay,* 346 U.S. 568, 569 (1954) ("In common parlance a right accrues when it comes into existence * * *."); *Unexcelled Chem. v. United States,* 345 U.S. 59, 65 (1953) ("A cause of action is created when there is a breach of duty owed the plaintiff. It is that breach of duty, not its discovery, that normally is controlling.").

This court must assess, however, the effect of Customs' regulations on this general rule for accrual of a right of action. In *Crown Coat Front Co. v. United States,* 386 U.S. 503, 509–11 (1967), the Supreme Court permitted a Government contract's disputes clause to delay accrual of a right of action arising under the contract. The contract bound the contractor to exhaust administrative remedies before instituting suit. *Id.* at 511–12. Where the parties had agreed in advance to a condition on the filing of a suit, the Supreme Court gave effect to that agreement by delaying accrual of the right of action.

---

[1] It appears that Customs may not have adhered strictly to its regulations. Section 172.1(a) of Title 19 of the Code of Federal Regulations (1982) requires Customs to notify the surety of liability on the bond "at the same time as the principal." According to the original complaint in this action, the United States made a formal demand on Old Republic on November 20, 1987 – over four years after it made a demand on Commodities. The only other evidence of record before this court on this issue, Customs' own automated billing record, gives November 16, 1987, as a date Customs made a demand on the surety.

In this case, however, the parties have not agreed to conditions on institution of a suit, rather Customs has unilaterally adopted regulations which delay filing of actions. The bond agreement does not require Customs to demand payment or to send notice before suing Commodities or Old Republic. The bond does not require Customs to wait 60 days for a response to the demand before suing. Moreover, Customs' Regulations do not state that commencement of the statutory period is postponed until after Customs gives notice and waits 60 days for a response. No statute requires Customs to give notice of demand for liquidated damages before suing. Without agreement of the parties or statutory obligations delaying the institution of suit, the general rule for accrual of a right of action still applies.[2]

The trial court erred in postponing commencement of the limitations period until after Customs complied with its own regulations. While Customs' self-imposed internal procedures may constrain its right to sue, a question we do not decide here, they cannot change the defendants' right to repose after the statutory six-year period. Customs' internal procedures are a unilateral effort to settle the dispute without resort to legal action.[3] This court cannot, however, permit a single party to postpone unilaterally and indefinitely the running of the statute of limitations.

By its terms, 28 U.S.C. § 2415 is subject also to statutory exceptions to the general rule regarding accrual of causes of action. The relevant statute, 28 U.S.C. § 2416 (1988), states:

> For the purpose of computing the limitations periods established in section 2415, there shall be excluded all periods during which—
>
> * * * * * * *
>
> (c) facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances * * *.[4]

---

[2] Under the bond agreement, Old Republic agreed to pay liquidated damages "[i]f principal defaults." The bond agreement did not require Customs to demand payment from Old Republic before suing. Thus, under the terms of the bond, Old Republic incurred liability to Customs when Commodities breached the bond. Customs' right of action against Old Republic therefore accrued at the same time its right of action accrued against Commodities.

[3] The Supreme Court has referred in dicta to 28 U.S.C. § 2415 as "a statute aimed at equalizing the litigative opportunities between the Government and private parties." *Crown Coat Front Co. v. United States,* 386 U.S. 503, 521 (1967). The Supreme Court noted that "[t]he congressional intent to 'put the Government on a parity with those private litigants who may sue' and 'to equalize the position of litigants' is sufficiently evident." *Id.* at 521 n.14 (citations omitted).

The intent of "equality" is not served by allowing the Government to unilaterally postpone accrual of a cause of action. A private corporation suing the Government may not stall the commencement of the statute of limitations merely with in-house proceedings which precede any lawsuit. Similarly, the Government may not indefinitely postpone the running of the statute merely by taking the steps any prudent litigant would take before bringing a lawsuit.

[4] While acknowledging that this subsection would primarily apply to cases of fraudulent concealment of Government causes of action, Congress recognized that the complexities and size of the Government could impede responsible officials' knowledge of material facts. S. Rep. No. 1328, 89th Cong., 2d Sess. 6 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2502, 2507; *see also United States v. Kass,* 740 F.2d 1493, 1497 (11th Cir. 1984). The legislative history of section 2416(c) explains:

> It is not intended that the application of this exclusion will require the knowledge at the highest level of the Government. Responsibility in such matters may extend down into lower managerial levels within an agency. As a general proposition, the responsible official would be the official who is also responsible for the activity out of which the action arose.

S. Rep. No. 1328 at 6.

The language of section 2416(c) requires this court to examine the nature of the "facts material to the right of action." Only facts which could not reasonably be known by a relevant Government official postpone accrual. Under the facts of this case, relevant Government officials reasonably could have known of the cause of action before March 17, 1983. Thus, in the words of our sister circuits, "once the facts making up the 'very essence of the right of action' are reasonably knowable, the § 2416 bar is dropped." *United States v. Gavilan Joint Community College Dist.,* 849 F.2d 1246, 1250 (9th Cir. 1988) (quoting *United States v. Kass,* 740 F.2d 1493, 1497 (11th Cir. 1984) (quoting S. Rep. No. 1328, 89th Cong., 2d Sess. 6 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2502, 2508)).

Section 2416(c) does not postpone accrual of the Government's cause of action beyond March 17, 1983. On February 22, 1983, Customs inspected Commodities' warehouse. These inspecting officials found that Commodities had not marked some merchandise with proper warehouse entry numbers. The absence of the markings breached the bond. Simply viewing the boxes made this blatant breach apparent. Thus, because the Government's right of action accrued before March 17, 1983, this action is time barred.

CONCLUSION

The Court of International Trade properly asserted jurisdiction over this action. That court also applied the proper statute of limitations. However, that court erred in finding that the Government had filed its action within the six-year time bar.

REVERSED

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 93–29)

ORNATUBE ENTERPRISE CO., LTD., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND HANNIBAL INDUSTRIES, INC., DEFENDANT-INTERVENOR

Court No. 92–07–00444

[*Held:* Plaintiff's motion for a Judicial Protective Order is denied. Plaintiff's Motion for an Order to Admit the Case Briefs, Dated as of March 10 and 16, 1992 is denied, but the March 16 Case brief is remanded to the Department of Commerce to sever and expunge the new information in that brief that was in contravention of prior instructions relating to the March 10 and March 16 briefs.]

(Dated March 10, 1993)

MEMORANDUM OPINION AND ORDER

The Judicial Protective Order:

MUSGRAVE, *Judge:* The plaintiff has moved for a Judicial Protective Order "(JPO"). Defendant-intervenor opposes plaintiff's motion and pleads that the Court deny Mr. Shieh, plaintiff's counsel, a JPO altogether. In the alternative, defendant-intervenor requests that Mr. Shieh be placed under the same order as previously existed by consent between it and the government.

Defendant-intervenor's opposition motion raises serious doubts, supported in the record, as to whether plaintiff's counsel, Liang-Houh Shieh, or any member of his law firm (of the same name) can be trusted with confidential information in this case. The Court concludes that plaintiff's counsel should be denied access to confidential information in this case; accordingly, plaintiff's Motion for a Judicial Protective Order is denied.

BACKGROUND

Throughout the proceedings before the Department of Commerce ("Commerce" or "DOC" or "Department"), Mr. Shieh failed to follow the regulations and procedures of the Department with regard to proprietary information. For example, this failure led to the denial of his application for an administrative Protective Order ("APO"). *See Defendant-Intervenor's Memorandum in Opposition to Plaintiff's Motion for Judicial Protective Order for Access to the Proprietary Portion of the Ad-*

ministrative Record ("Defendant-Intervenor's Brief") at 2–4; 19 C.F.R. § 353.34(a). Mr. Shieh also frequently did not serve copies of APO documents filed with the DOC on opposing counsel subject to the APO. *Defendant-Intervenor's Brief* at 4; 19 C.F.R. § 353.31; *See Domestic Interested Parties' Letter of August 2, 1991, A. R. Doc. 17 at 1–2.* The sum of the evidence documented on the record of the administrative review below indicates that Mr. Shieh either did not understand or refused to abide by the regulations concerning the protection and dissemination of proprietary information.

Equally disturbing, Mr. Shieh showed a disrespect for the protection of proprietary information in his general handling of an inadvertent release of proprietary information to him by Commerce. On February 13, 1992, Mr. Shieh was faxed a letter from Commerce requesting that the materials and any copies be returned to the Department. *A. R. Doc. 42.* According to Commerce, Mr. Shieh's response was that he had not returned the materials because he was entitled to an APO and wanted to discuss provisions for obtaining one. *Memorandum of Telephone Conversation with Mr. Liang-Houh Shieh, A. R. Doc. 43.* When the document was finally returned, each page of the 107 page computer printout had been individually detached, and Mr. Shieh did not include a certification that he had not used, reproduced or disseminated this information in any manner. *See A. R. Doc. 47.*

When Commerce formally requested such a certification, *A. R. Doc. 48,* Mr. Shieh responded on February 19, 1992, with a letter containing the following statement:

> I would like you to send me a letter explaining why I have to follow the order from DOC for its own mistake. I also need legal citations as to under what rules DOC can repeatedly order me to do something for its own mistake * * *. If my APO is denied, why am I bound by APO * * *? When everything is clear to me, then I will make decision as to whether or not I have to follow DOC's order for its own mistake.

A. R. Doc. 50 at 2.

In addition to the ethical and professional concerns raised by the above-mentioned behavior on the part of Mr. Shieh, his proposed JPO contains several technical flaws such as failing to state with specificity the persons in his office who would be granted access to his JPO, expanding the record beyond that previously allowed by the DOC, and placing unreasonable limits on the use of electronically stored data.

In deciding whether to release proprietary information under a JPO, the Court must balance the need for the information sought against the potential harm that would result from disclosure. *Chevron U.S.A., Inc. v. United States,* 11 CIT 76, 78 (1987). In *Chevron,* the Court stated its authority to deny a protective order in appropriate circumstances.

> It is clear that a court has the authority to "deny access to all [proprietary data] where the specific facts indicate a probability where confidentiality, under any form of protective order, would be seri-

> ously at risk. *United States Steel Corp. v. United States,* 730 F.2d 1465, 1469 (Fed. Cir. 1984), *vacating,* 6 CIT 55, 569 F. Supp. 870, *reh'g denied,* 6 CIT 176, *opinion amended,* 6 CIT 238, 578 F. Supp. 415 (1983).

Chevron, 11 CIT 79; See 19 U.S.C. § 1516a(b)(2)(B)(1982 & Supp. 1992); see also USCIT R. 26(c)(7) (allowing the Court to order that "commercial information not be disclosed or be disclosed only in a designated way"). In this case, there are specific facts which indicate that confidentiality, under any form of protective order, would seriously be at risk if Hannibal's information is released to counsel for plaintiff. The Court offered to hold oral argument on the issue of the JPO, provided that *Ornatube* produce a corporate representative to be present at the hearing. The Court obtained the consent of the defendant and of the defendant-intervenor. Although Mr. Shieh offered to appear on behalf of plaintiff, his firm declined to produce a corporate representative as requested by the Court.

Accordingly, the Court rules that it will not grant a JPO to Mr. Shieh's law firm. *Ornatube* is invited to present another legal representative to the Court that may satisfy the Court's concerns regarding the JPO elucidated above. Plaintiff's motion is denied.

Motion to Submit Case Briefs to the Administrative Record:

In addition to plaintiff's motion for a JPO, Plaintiff has created a self-styled motion without following Court rules or procedures to reintroduce two versions of his principal brief to the DOC into the administrative record by order of this Court. These briefs were expunged from the record by the DOC because they contained new information. The entirety of both briefs was expunged even though the second attempted filing included the new information as a severable exhibit. The apparent result is that plaintiff never succeeded in placing his brief—in any form—into the administrative record.

The DOC contends that the second filing did not comply with its order to edit out the new information and that the new information in the second filing was not limited to the severable exhibit.

> Ornatube submitted case briefs on March 10, 1992, and March 16, 1992, well after the deadline [October 15, 1991] for submitting factual information. Both case briefs contained factual information that was not submitted previously in Ornatube's original questionnaire response, in its deficiency response, or at any other time during the administrative review proceeding. The March 10 case brief contained completely new factual information concerning (1) Ornatube's internal quality control data, (2) Ornatube's actual cost of coil, (3) Ornatube's costs, quantities and sales contracts with suppliers regarding imported, hot-rolled coil, and (4) Ornatube's selling, general, and administrative ("SG & A") expenses. Exhibit 1; PR 59; CR 11. The March 16, 1992, case brief also contained new factual information concerning Ornatube's SG & A expenses. Exhibit 2; PR 66; CR 12. This was the same information Commerce identified as new in the March 10 case brief, together with further

> explanation of Ornatube's SG & A expenses. In addition, the March 10 case brief, which was replete with new factual information, was attached as an appendix to the March 16 case brief.

Defendant's Opposition to Plaintiff's Motion to Submit Case Briefs at 6–7.

Commerce further points out that Ornatube missed its deadlines and refused twice to comply with Department instructions on what it should have included in the case brief. Moreover, Commerce points out that the information contained in the two case briefs was not in the administrative record when Commerce decided upon its calculation methodology and determined that it would have to resort to BIA to calculate Ornatube's FMV. If this information is added to the administrative record, so Commerce argues, this Court will review Commerce's determination with the benefit of information that was not before the commerce decision-maker at the time Commerce issued its final results. *Defendant's Opposition to Plaintiff's Motion to Submit Case Briefs* at 9.

Ornatube has included new information in its March 16 brief. The Court does not see the difficulty in severing this new information, expunging it from the record, and retaining the information that did comply with Commerce's instructions for editing the March 10, 1992 case brief. The matter of the case briefs is accordingly remanded to the DOC for a reasonable revision of the submitted material. For example, Commerce could decide to admit only the March 16 brief without the "severable attachment" (section "D" entitled "New Information Issue"). Likewise, Commerce could reject the "new" SG & A figures used by Ornatube on page 8 of its March 16 brief. Rather, the figures submitted by Ornatube in its October 23, 1991 cost of production questionnaire response could be used in its place. *See A. R Doc. 66, Letter of DOC, March 23, 1992* at 1 (rejecting both case briefs and citing to new, improper information in the March 16 brief).

It is hereby ORDERED that plaintiff's motion for a JPO is denied. It is further

ORDERED that the Department of Commerce accept the information that was properly before it in the March 16 brief and expunge the new and improper information in accordance with this decision.

(Slip Op. 93–30)

BOUSA, INC., FORMERLY KNOWN AS BULK OIL (USA), INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 90–12–00657

Defendant moves to dismiss for lack of jurisdiction because plaintiff has not paid liquidated duties prior to commencing action. Plaintiff is in bankruptcy. *Held:* The case is dismissed for lack of jurisdiction.

(Decided March 10, 1993)

Herbert Peter Larsen, (*Herbert Peter Larsen*) for plaintiffs.

Stuart M. Gerson, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, United States Department of Justice (*Carla Garcia-Benitez*) for defendant.

OPINION

MUSGRAVE, *Judge:* This unusual case is before the Court on plaintiff's motion to suspend the case and the government's cross motion to dismiss for lack of jurisdiction. The Court finds that it is without jurisdiction and the case is dismissed.

Plaintiff invokes the jurisdiction of the Court under 28 U.S.C. § 1581(a), to contest the Customs Service action denying plaintiff's protest of the liquidation of three entries. Two entries were liquidated on September 19, 1986 and the third was liquidated on September 26, 1986. Plaintiff timely filed protest on November 13, 1986.

On December 29, 1989, plaintiff filed for bankruptcy protection under Chapter 11. On June 15, 1990, the Customs Service denied plaintiff's protest. Plaintiff timely filed for review in this court, but plaintiff's bankruptcy prevented it from paying the increased liquidated duties prior to commencing this action. *Memorandum In Opposition To Defendant's Motion To Dismiss,* at 1,2.

This Court has exclusive jurisdiction over any civil action commenced to contest the denial of a protest under Section 515 of the Tariff Act of 1930. 28 U.S.C. § 1581(a). However, such an action may be commenced only if all liquidated duties, charges, or exactions have been paid at the time the action is commenced. 28 U.S.C. § 2637(a). This requirement is strictly applied, and the statute precludes any exercise of discretion by the court. *Penrod Drilling Co. v. United States,* 13 CIT 1005, 1007, 727 F. Supp. 1463, 1465 (1989). The statute does not contain an exception for plaintiffs in bankruptcy. Accordingly plaintiff's action must be dismissed.

Plaintiff argues that the Customs Service denial of the protest violated 11 U.S.C. § 362, which provides for an automatic stay of "the commencement or continuation * * * of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title." A similar conclusion was drawn in *In re Apex Oil Company,* 131 Bankr. 712, 1991 U.S. Dist. Lexis 12,701 (E.D. Mo.

1991). The *Apex* court concluded that post-petition actions taken by Customs, including denial of a protest involving repayment of excess drawback, violated the automatic stay and were thus null and void.

While it is possible that a claim asserting that the action of the Customs Service was void *ab initio* under § 362 is not asserted to "contest the denial of a protest," and may thus find a basis for jurisdiction other than § 1581(a) in this Court or in the bankruptcy court, any ruling on the merits of the protest must be made by this Court under § 1581(a). Plaintiff asserts no other basis for the present action, and the Court declines to search for one *sua sponte.*

Accordingly, this action is dismissed for lack of jurisdiction.

(Slip Op. 93–31)

TEXACO MARINE SERVICES, INC. AND TEXACO REFINING AND MARKETING, INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 89–12–00652

Plaintiffs move, pursuant to Rule 56 of the Rules of this Court, for summary judgment claiming that certain items associated with ship repairs were not dutiable under 19 U.S.C. § 1466(a). Plaintiffs specifically object to the duty imposed on: (1) costs for cleaning after the completion of dutiable repairs, and (2) costs for application of protective coverings. Defendant opposes plaintiffs' motion and cross-moves, pursuant to Rule 56 of the Rules of this Court, for summary judgment.

Held: Plaintiffs' motion is denied and defendant's cross-motion is granted as the cleaning and coverings-were integral parts of the repairs. Therefore, the subject costs fall within 19 U.S.C. § 1466(a) and are thus dutiable.

[Plaintiffs' motion for summary judgment is denied; defendant's cross-motion is granted.]

(Dated March 10, 1993)

Givens and Kelly (*Sharon Steele Doyle*) for plaintiffs.

Ernest J. Corrado, President and Counsel for the American Institute of Merchant Shipping, *amicus curiae* in support of plaintiffs' motion.

Stuart M. Gerson, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Bruce N. Stratvert*); of counsel: *Stephen Berke,* Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs Service, for defendant.

Collier, Shannon, Rill & Scott (*Lauren R. Howard*), Ship-builders Council of America, Inc., *amicus curiae* in support of defendant's cross motion.

OPINION

TSOUCALAS, *Judge:* This case involves the S.S. Texaco Georgia, an American-flag 16,514 ton lube oil carrier, which underwent certain repairs and alterations at the Hellenic Shipyards Co. in Athens, Greece, between June 16, 1987 and July 18, 1987.

Upon the ship's return to the United States, the work performed on the ship was declared and entered by plaintiffs, Texaco Marine Services,

Inc. and Texaco Refining and Marketing, Inc. ("Texaco"), pursuant to requirements of the vessel repair statute, 19 U.S.C. § 1466 (1988). On February 15, 1989, plaintiffs paid $294,846.38, the liquidated amount of duty and interest on vessel repair entry No. C21–0000060–6, which included duty on the contested costs.

Texaco now moves, pursuant to Rule 56 of the Rules of this Court, for summary judgment, challenging the duties imposed on (1) costs of cleaning performed after dutiable repair work was completed, and (2) costs of temporary coverings used to protect cargo lines while dutiable repairs were occurring. Plaintiffs maintain that duties should not have been imposed on the above subject costs because they do not fall within the meaning of "repairs" or "expense of repairs" pursuant to 19 U.S.C. § 1466(a).

Defendant cross-moves for summary judgment claiming that the cleaning and the coverings used fall within the meaning of "repairs" because both were integral parts of the repairs.

Discussion

According to 19 U.S.C. § 1466(a):

> The equipments, or any part thereof, including boats, purchased for, or the repair parts or materials to be used, or the expenses of repairs made in a foreign country upon a vessel documented under the laws of the United States to engage in the foreign or coasting trade, or a vessel intended to be employed in such trade, shall, on the first arrival of such vessel in any port of the United States, be liable to entry and the payment of an ad valorem duty of 50 per centum on the cost thereof in such foreign country.

See 19 U.S.C. § 1466(a); *see also Sea-Land Service, Inc. v. United States,* 17 CIT ____, ____, Slip Op. 93–13 at 2 (Jan. 28, 1993).

The courts have broadly construed section 1466 as an inducement to employ United States labor through the imposition of an *ad valorem* duty. *See Sea-Land Service, Inc. v. United States,* 12 CIT 287, 293, 683 F. Supp 1404, 1409 (1988). In *Mount Washington Tanker Co. v. United States,* 1 CIT 32, 505 F. Supp. 209 (1980), *aff'd,* 665 F.2d 340 (1981), the court stated that "section 1466 expresses the legislative policy designed to provide maximum protection to American shipyards." *Id.* at 38, 505 F. Supp. at 214. It has been further stated that Congress' intention was to encourage ship owners to employ U.S. labor whenever possible. *See id.; see also, Erie Navigation Co. v. United States,* 83 Cust. Ct. 47, 475 F. Supp. 160 (1979).

The issue in this case is whether various costs[1] fall within the meaning of "repairs" as contained in 19 U.S.C. § 1466(a) and are therefore subject to duties.

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[1] The contested costs are as follows:

1. Cleaning of the area after boiler repairs completed	$870
2. Tanks and exposed deck and deck machinery cleaned	$28,739
3. Removing all debris and sediment	$5,300
4. Protecting heating coils by wrapping in blankets	$20,919

1. *Cleaning:*

Texaco maintains that the cleaning at issue is not within the scope of repairs because the cleaning was done either in preparation of repair work or after the repair work was completed. Defendant, on the other hand, claims that the cleaning work does fall within the meaning of "repairs" because it was an integral part of the dutiable repairs.

The statute, 19 U.S.C. § 1466(a), fails to define "repair" or "expenses of repairs," and fails to state whether cleaning is included within the meaning of repairs.

Cleaning done prior to repairs has been held to be dutiable. *See* 15 Cust. B. & Dec. 1103, C.S.D. 81–188 (1981). Plaintiffs illogically claim that since cleaning performed prior to repairs is dutiable, then cleaning performed subsequent to repairs must not be dutiable. Plaintiffs' argument is unfounded as the court and Customs have remained silent on whether post-repair cleaning is dutiable, and thus, by insinuating otherwise, plaintiffs are making a tremendous assumption.

Plaintiffs also rely on various decisions which concluded that cleaning in preparation of future cargo is not dutiable. *See States Steamship Co. v. United States,* T.D. 49,531, 73 Treas. Dec. 718 (1938); *Waterman Steamship Corp. v. United States,* 26 Cust. Ct. 114, C.D. 1310 (1951); *Northern Steamship Co., Inc. v. United States,* 54 Cust. Ct. 92 (1965). Plaintiffs infer that the cleaning performed on the Texaco Georgia is also not dutiable claiming that it was done in order to carry future cargo. Plaintiffs' reliance on this theory, however, is misplaced because had it not been for the repairs on the Texaco Georgia, the cleaning would not have been necessary. The cases relied upon by plaintiffs did not involve repairs at all, but solely included cleaning in preparation for future-cargo. See *id.*

As a general rule, if the cleaning procedures "are incident to or accompany repairs, they will be held dutiable; if conducted without regard to repairs, they are not dutiable." *See* Treasury Ruling Letter 101423 BJF at 3 (Oct. 20, 1976), attached to *Amicus Curiae's Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendant's Cross-Motion for Summary Judgment filed by Shipbuilders Council of America, Inc. ("Amicus Curiae Memorandum)* at Exhibit 4. Furthermore, if the cleaning operations were an "integral" or a "necessary" part of the dutiable repairs, then the cleaning is also dutiable. *See Sea-Land,* 12 CIT at 294, 683 F. Supp. at 1409; *see also* Treasury Ruling Letter HQ 111730 at 3–4 (Sept. 19, 1991), attached to *Amicus Curiae Memorandum* at Exhibit 5; Treasury Ruling Letter 108112 EA at 3 (Aug. 21, 1986), attached to *Amicus Curiae Memorandum* at Exhibit 3; Treasury Ruling Letter 101423 BJF at 3 (Oct. 20, 1976), attached to *Amicus Curiae Memorandum* at Exhibit 4.

The cleaning in this case was indeed an integral part of the repair process since the cleaning would not have been necessary but for the repairs. Therefore, the cleaning costs are properly dutiable under the stat-

ute and this Court denies plaintiffs' motion and grants defendant's cross-motion for summary judgment as to this issue.

2. *Protective Coverings:*

During the repair process, protective coverings were placed on the Texaco Georgia's heating coils. Texaco claims that these actions were "protective/preventative measures which were not part of the actual repairs and were not necessary to accomplish the repairs." *Plaintiffs' Motion for Summary Judgment* at 8. Furthermore, Texaco claims that these items did not contribute to the restoration of the vessel and, therefore, should not be considered as dutiable repairs.

The protective coverings, however, are an integral part of the repair process and would not have been necessary but for the repairs. *See* Treasury Ruling Letter 108404 GV at 5 (Aug. 7, 1986), attached to *Amicus Curiae Memorandum* at Exhibit 10. Therefore, by the same reasoning that the cost of the cleaning is dutiable, the cost for the protective coverings are dutiable as they are an integral part of the repair process. Furthermore, plaintiffs offer no evidence to indicate that the protective coverings were not a necessary part of the repairs. Therefore, the determination by Customs as to the protective coverings is affirmed.

Conclusion

In accordance with the foregoing opinion, the cleaning and the protective coverings were integral parts of the repair process, and the costs of these items were properly dutiable. Thus, this Court denies plaintiffs' motion for summary judgment and grants defendant's cross-motion for summary judgment.

NOTE: Pursuant to the Court's Procedures for Publication of Opinions and Orders, the Court's unpublished order entered on March 10, 1993 is being published by the Clerk's Office as Slip-Op. 93–32 on March 11, 1993.

(Slip Op. 93–32)

Koyo Seiko Co., Ltd. and Koyo Corp. of U.S.A., plaintiffs, and Isuzu Motors Ltd. and American Isuzu Motors Inc., intervenors *v.* United States and U.S. Department of Commerce, defendants, and Timken Co., intervenor

Court No. 90–10–00546

(Dated March 10, 1993)

ORDER

Tsoucalas, *Judge:* Upon consideration of defendants' consent motion for modification of Slip Op. 93–3, it is hereby

Ordered that the motion is granted and that the U.S. Department of Commerce is authorized, upon remand, to utilize an improved computer program consistent with the methodology utilized in the original administrative review, as modified by this Court.

(Slip-Op. 93-33)

FORMER EMPLOYEES OF HEWLETT-PACKARD CO., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 92-02-00072

(Dated March 11, 1993)

ORDER

GOLDBERG, *Judge:* By order of January 21, 1993, this court reversed the final negative determination issued by the Secretary of Labor, *Koh-Noor Rapidograph, et. al.*, 56 Fed. Reg. 58711 (Dept Labor 1991) (Negative eligibility determination); *Hewlett-Packard Co. Rockaway, N.J.*, 56 Fed. Reg. 67103 (Dept Labor 1991) (Application for Reconsideration Dismissal). The court remanded the case to the Secretary of Labor, and the Secretary of Labor was directed to provide a determination regarding certification for eligibility for trade adjustment assistance in accordance with the views expressed in the opinion. The Secretary of Labor was ordered to report the results of its remand determination to the court within 30 days of the date of said order.

The Department of Labor has filed to comply with said order, and the court, therefore, pursuant to Rule 16(f) of the Rules of this court, hereby

ORDERS: The Department of Labor by March 21, 1993 to show good cause for failing to report the results of its remand determination to the court in accordance with said order, and to show good cause why the Department of Labor should not pay all reasonable expenses incurred by plaintiffs because of its failure to do so; and furthermore

ORDERS: That should the Department of Labor fail to show good cause by March 21, 1993 why it failed to report the results of its remand determination, the court will issue a determination in favor of plaintiffs in the underlying action on the grounds that substantial evidence does not exist for the Department of Labor to deny trade adjustment assistance to plaintiffs.

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